

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**



Original - Affidavit of Mailing

**74-2030**

To be argued by  
HAROLD J. FRIEDMAN

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**  
**Docket No. 74-2030**

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IN THE MATTER OF THE APPLICATION OF:  
WILLIAM JONES, CLARENCE BERRIS, MARY HOBBS,  
ROBERT CURRY, Mrs. EVELYN BROWN, THOMAS  
HOLMES, Mrs. EPPIE JOHNSON, WILLIAM HARRIS,  
Mrs. ALBERTHA JOHNSON, Mrs. ROSE WILLIS, Mrs.  
SHARA BROWN, WILLIAM DORY, Mrs. ELLA HARRIS,  
GEORGE ROSTKY and GREAT NECK MANOR CIVIC  
ASSOCIATION, and all others similarly situated,  
*Petitioners-Appellants,*

—v.—

ROBERT C. MEADE, JAMES R. WELLS, MICHAEL J.  
TULLY, JR., GEORGE C. SOOS, FELIX G. ANDREWS,  
JOHN F. McDONALD, ARTHUR G. BINGHAM, WILLIAM  
H. RYAN, JR., TOWN OF NORTH HEMPSTEAD,

*First Respondents-Appellees,*

HECTOR H. GAYLE, Executive Director, BERNARD GARTLER,  
Chairman, JOSEPH CECI, DR. CURTIS KENDRICK,  
LOCAL URBAN RENEWAL PLANNERS,

*Second Respondents-Appellees,*

JOHN MAYLOTT and GERALD B. CRUISE, DEPT. OF  
HOUSING AND URBAN DEVELOPMENT,

*Third Respondents-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

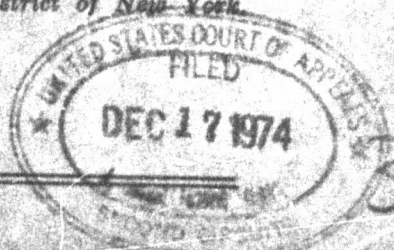
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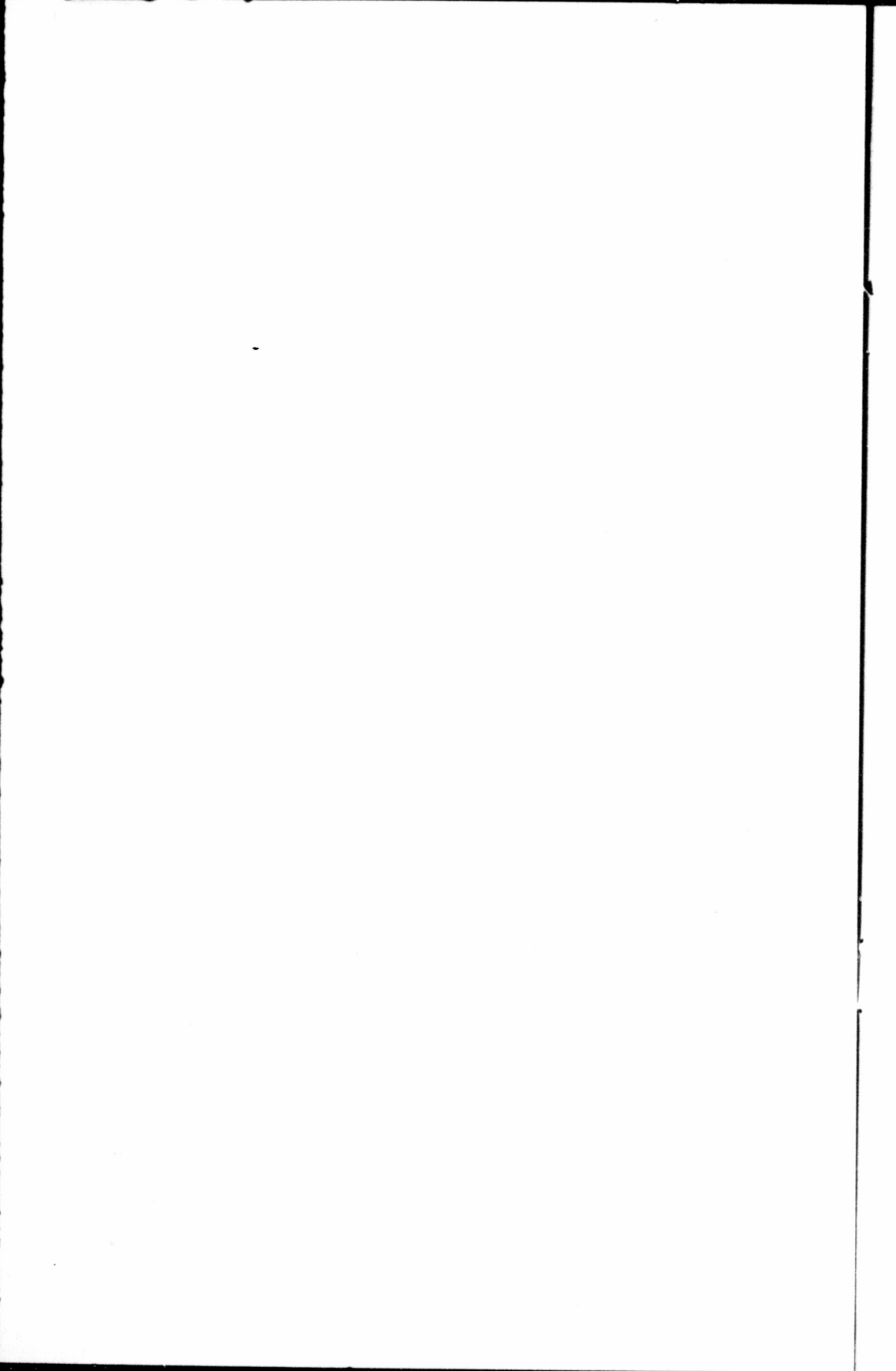
**BRIEF FOR FEDERAL RESPONDENTS**

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DAVID G. TRAGER,  
United States Attorney,  
Eastern District of New York

PAUL B. BERGMAN,  
HAROLD J. FRIEDMAN,  
Assistant United States Attorneys,  
Of Counsel,







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WILLIAM DORY, MRS. ELLA HARRIS, GEORGE ROSTKY  
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**BRIEF FOR FEDERAL RESPONDENTS**

## Preliminary Statement

Petitioners appeal from an order of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered June 26, 1974, granting the motion of the third respondent, the Secretary of Housing and Urban Development, for summary judgment and dismissal of the complaint.\* Petitioners' complaint, brought pursuant to 28 U.S.C. §§ 1331 and 1343, sought to enjoin construction of a low and moderate income housing project funded, in part, with federal money.

On this appeal, petitioners contend that summary judgment was inappropriate because an issue exists as to (1) whether the housing project when completed will promote racial segregation; and (2) whether there was adequate evidence to support the determination by the respondents that the area was otherwise qualified for federal funding.

## Statement of the Case

### (1)

Petitioners in their individual capacities are home owners and residents of the Town of North Hempstead (the "Town") within the unincorporated area of Manhasset in the neighborhood known as Spinney Hill. Some petitioners are members of the Great Neck Manor Civic Association, a non-profit organization within the Spinney Hill community.

The first respondents are the Town and its supervisor. The second respondents are the executive director and chairman of the North Hempstead urban renewal agency—the Local Planning Agency (the "LPA"), and urban re-

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\* The decision of Judge Bartels is reported in *Jones v. Tully*, 378 F. Supp. 286 (E.D.N.Y. 1974).

newal planners. The third respondent is the Secretary of the United States Department of Housing and Urban Development ("HUD") and other employees of HUD.

Petitioners commenced this action seeking to preliminarily and permanently enjoin the construction of a proposed 100 unit public housing site in Spinney Hill under the Federal Neighborhood Development Program ("NDP").\*

NDP is a program to help communities carry out development and renewal projects with federal funding on an annual basis. 42 U.S.C. §§ 1701t, 1712t. Before a locality may receive federal funds for renewal assistance, including federal assistance under an NDP, the locality must first submit to HUD a workable program for community improvement that is acceptable to HUD. 42 U.S.C. § 1451. The workable program must include an acceptable

"workable program for community improvement" [including] ("an official plan of action . . . for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life)." 42 U.S.C. § 1451.

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\* The proposed site is situated within the Town in the unincorporated area of Manhasset, in a blighted, predominantly minority neighborhood known as "Spinney Hill" (A. 10).

The LPA proposes to develop 100 rental units consisting of 20 low income units with rent supplements and 80 moderate income units (A. 1, 10). Federal funds have been committed to the LPA for land acquisition for the housing site (A. 5). The construction costs will be completely financed under New York State's "Mitchell-Lama" program, N.Y. Private Housing Finance Law § 10 (McKinney's Supp. 1973). No federal funds will be involved beyond land acquisition, site clearance and relocation costs (A. 5). For the Court's convenience, references to the Federal Respondents' Appendix will be parenthetically made as follows: "A. ".

Under 42 U.S.C. § 1451(e), HUD is required to determine that (1) the workable program is of sufficient scope and content to furnish a basis for evaluation of the need for the NDP, and (2) the NDP is in accordance with the workable program. Moreover, under the Civil Rights Act of 1968, 42 U.S.C. § 3608(d)(5), HUD is required to administer the program relating to housing and urban development "in a manner affirmatively to further the policies" of fair housing under the Civil Rights Act. See also, 24 C.F.R. Part 511 (A. 88).

(2)

Pursuant to its own regulations, HUD carefully scrutinized the Town's plans to provide non-segregated low and moderate income housing. In March, 1971, prior to the Spinney Hill NDP proposal, HUD withheld recertification of the Town's workable program, demanding that the Town submit concrete evidence that it would provide relocation housing outside racially concentrated areas for displacees from governmental redevelopment programs (A. 21, 31, 35, 36, 38, 39, 41).

In response to HUD's demands, on June 15, 1971 the Town Board passed Resolution #369-1971 expressing its intent "to utilize all resources available to encourage construction of low and moderate income housing outside areas of racial concentration for residents of all races and economic mixes." Only after this resolution was passed did HUD recertify the Town's workable program for the fiscal years July 1, 1971 to July 1, 1973 (A. 42).

In carrying out its resolution, the Town proposed to HUD three sites located within the Town: (1) the Cuttermill Road Site, located in Great Neck in a predominately white neighborhood consisting of 72 low-income units; (2) the Port Washington Boulevard site located in Port Washington adjacent to a predominately minority housing project which is surrounded by a predominately white



neighborhood and consisting of 28 low income units; and (3) the Spinney Hill site, located in the unincorporated area of Manhasset consisting of 80 moderate and 20 low income units in the predominantly minority neighborhood known as Spinney Hill (A. 6, 25).\*

The current Spinney Hill NDP was originally approved by HUD for its first year of NDP funding in September, 1972. Prior to HUD approval of the Spinney Hill NDP, public hearings were held pursuant to 42 U.S.C. § 1455(d). The Town Planning Board held hearings in May, 1972 and the Town Board held hearings in June, 1972 (A. 13). Petitioners spoke against the site at these hearings. Other residents, local civic and civil rights associations, including the local chapter of the NAACP and the Manhasset Inter-Faith Council, spoke in favor of the project (A. 10-13). The overwhelming majority of the residents of the community supported the site and thereafter, as Judge Bartels noted: "After hearing the voice of the area residents, the Town Board unanimously approved the project on June 13, 1972 in compliance with 42 U.S.C. § 1469(c)(1)" (A. 72).

In September, 1972, following the Town's resolution and pursuant to its NDP project selection criteria (which then was in its formative stages and is now codified in 24 C.F.R. Part 511), HUD reviewed and approved the Spinney Hill NDP for its first year of funding (A. 5, 43, 44, 51).\*\* Under HUD's project selection criteria system the Spinney Hill NDP,

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\* The Cuttermill Road and Port Washington Road sites will be federally financed entirely under 42 U.S.C. § 1401, *et. seq.*, in contrast to the Spinney Hill site, which is receiving only partial federal funding. See footnote, *supra*, page 3.

\*\* Under HUD regulations, the locality must submit acceptable assurances of compliance with the Civil Rights Act of 1964, 24 C.F.R. § 511.4(c), prior to further consideration of the locality's NDP application. Then, HUD determines the degree to which the locality where the project will be located "has a realistic plan to expand the supply of standard low-and-moderate-income housing in a non-discriminatory way outside areas of concentration of economically disadvantaged or minority citizens." 24 C.F.R. § 511.20.

"... was given an 'adequate' rating by HUD as to whether there was a significant expansion of the supply standard housing for low and moderate income families in a non-discriminatory way. HUD gave it a 'good' rating as to whether the locality had a realistic plan to expand the supply of such housing outside areas of minority concentration . . . Furthermore, the Spinney Hill NDP was found to meet all the prerequisites of 24 C.F.R. Part 511" (A. 5, 17).

The "good" rating was primarily based on the proposed Cuttermill Road site which was approved unconditionally. The Port Washington Boulevard site was approved conditionally based on its simultaneous development with the Cuttermill Road Site. In approving the Port Washington Boulevard site HUD recognized that this site was acceptable only as a required ingredient to the cost feasibility of the more expensive Cuttermill Road site.\*

In addition, HUD found that the LPA had an affirmative action renting program whereby it would attempt to attract whites to the Spinney Hill Site and that 80% of the units would be moderate income. Moreover, HUD found that the Spinney Hill site, while predominately minority concentrated, is nevertheless unlike the large urban ghettos of America, for adjacent to the Spinney Hill site within the Spinney Hill neighborhood is a senior citizen housing complex, the makeup of which is 60% minority and 40% white (A. 12). HUD also found that (1) housing vacancies are virtually non-existent in the Town with a low vacancy rate of only 2.2% and thus, the site would be attractive to all people seeking vitally needed moderate and low income housing; and that (2) the

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\* The Cuttermill Road site became the subject of controversy on alleged environmental grounds (A. 55-56, 59-60).

children who would reside in the Spinney Hill NDP area would go to schools in the Great Neck School District which has a low minority enrollment of 4%. Thus, it was found that there would not be any significant adverse racial impact on the schools (A. 30).

(3)

On June 27, 1973, nearly a year after HUD approved the Spinney Hill NDP site, petitioners commenced the instant action in the District Court alleging that the Spinney Hill site would perpetrate racial segregation. On August 31, 1973, Judge Bartels denied petitioners' motion for a preliminary injunction and directed them to exhaust their administrative remedies by filing a complaint with HUD under 24 C.F.R. § 1.7.\*

On September 6, 1973, petitioners filed a complaint with HUD and HUD conducted its second investigation of the site, the first having been under its project selection criteria procedures. HUD met with the complainants, local renewal officials and Town officials, as well as reviewing HUD files. HUD filed a final investigative report on November 5, 1973, concluding that there was no merit in the petitioners' allegations that HUD in approving the Spinney Hill site was perpetuating racial segregation. The investigative report concluded that the Town's workable program was proper and that the Town had taken affirmative steps to implement a policy of non-discriminatory housing (A. 19).

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\* HUD agreed to waive the requirement that a complaint must be instituted within 90 days of the challenged HUD final approval. The District Court retained jurisdiction pending the HUD investigation.

## ARGUMENT

### **The District Court properly granted summary judgment.**

Petitioners contend that the District Court erred in granting summary judgment. That contention is based upon two separate but interrelated arguments which coalesce into what must necessarily be their assertion that an issue of fact exists as to whether the Spinney Hill site will perpetuate racial segregation in the Town. Thus, petitioners argue that (1) the determination by HUD that the Spinney Hill project complies with the Civil Rights Act of 1964 was incorrect; and (2) that, in any event, the Spinney Hill site is clearly not "blighted" and, therefore is ineligible for federal funds. Petitioners' contention and the supporting arguments are without merit.

This court in reviewing Judge Bartels' decision to grant summary judgment to HUD must determine whether there are any material issues of fact and if there are none, whether HUD was entitled to judgment as a matter of law. Rule 56 (c) F. R. Civ. P.

#### **A. There is no material issue of fact.**

With respect to whether there was any material issue of fact, the administrative record and the several affidavits submitted in support of HUD's motion for summary judgment precisely delineated the facts in this case. Petitioners in their opposing affidavits did not controvert the administrative record as outlined in the above statement of facts.\*

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\* Petitioners also failed to reply to the Federal respondents' statement of facts not in issue as required by Rule 9(g) of the General Rules of the Southern and Eastern District Courts of New York. The failure to reply to the statement is deemed an admission of the material facts not in issue for purposes of the motion for summary judgment.

The rhetoric of their affidavits and memorandum of law in opposition to HUD's motion for summary judgment is not evidence and petitioners' conclusory affidavits were properly given little weight by Judge Bartels. *Dressler v. M. V. Sandpiper*, 331 F.2d 130, 133 (2d Cir. 1964). Petitioners did not point to a scintilla of evidence before the District Court that would create a material issue of fact and Judge Bartels found that there were no material issues of fact.

**B. As a matter of law, HUD is entitled to summary judgment as it did not act arbitrarily or capriciously in approving federal funds for the Spinney Hill site.**

**(1)**

**Standard of judicial review**

HUD has been given the responsibility by Congress to administer the various national housing programs so that vitally needed low and moderate income housing can be built. HUD is presumed to have expertise in the housing area and to utilize its expertise in its decisions to federally fund housing. Thus, when a court judicially reviews HUD administrative action under the various housing acts and in this case the civil rights acts, the standard of judicial review is an in depth review of the administrative record to determine if HUD acted arbitrarily or capriciously. In view of HUD's expertise, under the Administrative Procedure Act, courts review the HUD administrative fact finding process, rather than conduct a trial *de novo*. *Camp v. Pitts*, 441 U.S. 438 (1973).

The proper standard for judicial review is found in the Administrative Procedure Act. It is whether the HUD administrative decision to approve the funding of the Spinney Hill site is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.

§ 706(2) (A); 42 U.S.C. § 2000d-2; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).<sup>\*</sup> As Judge Bartels noted:

"The review is not a *de novo* or a substantial evidence review, but a thorough, probing in-depth review. *Camp v. Pitts*, 411 U.S. 438, 1241 (1973). The standard of review for informal agency action such as in the present case is enunciated in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)" (A. 77).

In *Citizens to Preserve Overton Park v. Volpe*, *supra*, an action to review a Department of Transportation decision with respect to where a federally funded highway would be located, the Supreme Court applied the arbitrary and capricious standard of the Administrative Procedure Act:

"To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . [citations omitted] . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard for review is a narrow one. The court is not empowered to substitute its judgment for that of the agency" (401 U.S. at 416).

Moreover, in *Southeast Chicago Commission v. Department of Housing and Urban Development*, 488 F.2d 1119 (7th Cir. 1973), there were allegations of civil rights violations, and the court used the arbitrary and capricious standard in reviewing HUD factual findings and granted summary judgment to HUD.

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<sup>\*</sup> See *Citizens Committee for Faraday Wood v. Lindsay*, Slip Op. 17 (2d Cir. Dec. 5, 1974) where at page 590 this Court held that low income status is not a suspect classification. Like *Citizens Committee for Faraday Wood*, there is no evidence in the case at bar of racial motivation or malice. Thus, the standard of review of HUD's action is found in 5 U.S.C. § 706(2) (A).

Applying the foregoing standard to the record in this case, it is clear that HUD followed its regulations and the law in approving federal funds for the Spinney Hill site, and that HUD did not act arbitrarily or capriciously.

(2)

**HUD properly followed its regulations**

Pursuant to *Shannon v. United States Department of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970), HUD was required to develop institutionalized procedures to enable it to make an informed decision as to whether federally financed housing that it was approving was in compliance with the Housing Act of 1949 (as amended) and the Civil Rights Acts of 1964 and 1968, 42 U.S.C. § 2000d, *et seq.* and 42 U.S.C. § 3601, *et seq.*

Unlike the facts in *Shannon*, in the instant case HUD has regulations that effectively set forth an institutionalized procedure whereby the Spinney Hill funding approval was made only after there had been a thorough evaluation of each facet of the locality's NDP plan. Since the Town's plans provided for the eventual construction of low and moderate income housing, the application was examined in light of the potential effect of such housing on the racial concentration of the NDP area.

Before approving federal funds for the site, HUD reviewed the Town's plan to expand the supply of low and moderate income housing in a non-discriminatory way, outside areas of minority concentration. HUD concluded that the Town has a "good" plan to expand the supply of low and moderate income housing outside areas of minority concentration. This finding was based on the Town's resolution which states the Town's official policy to construct housing outside areas of racial concentration and the Town's proposal for construction of low and moderate income housing on the Cuttermill Road site (A. 5, 17-18). HUD's requirement that the Town assure HUD that it would provide comparable low and moderate income housing outside minority impacted areas has been met, and the requirements of the law have thus been fulfilled.

## (3)

**HUD properly based its decision on relevant factors**

In deciding to fund the Spinney Hill site, HUD based its decision on relevant factors and, contrary to petitioners' unsupported allegations, HUD's decision was not "clear error judgment." The pertinent HUD regulations provided an institutionalized method of determining whether the site is in conformance with the law. 24 C.F.R. Part 511, *et seq.*; *Shannon, supra*. The crux of the HUD analysis was whether the Town has a plan to provide and promote integrated housing throughout North Hempstead. This was the overriding relevant consideration which HUD was required to consider and did in fact evaluate.

The fact that the Town will be building low income housing outside as well as within areas of racial concentration is sufficient to sustain HUD's approval of the Spinney Hill site. Indeed, housing may be built exclusively within a racially impacted area. As noted in *Shannon*:

"There will be instances where a pressing case may be made for the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for . . . minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration." *Shannon, supra*, 436 F.2d at 822.

*Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1972). Moreover, in *Croskey Street Concerned Citizens v. Romney*, 335 F. Supp. 1251 (E.D. Pa. 1971), *aff'd*, 459 F.2d 109 (3d Cir. 1972) the court approved four structures within a racially impacted area and only one structure in a non-racially impacted neighborhood because HUD had considered the substantive issues concerning site selection and racial concentration. There,



HUD had assurances that the Town would build housing outside racially impacted areas. Thus, housing can properly be built in a racially impacted area.

In the case at bar, HUD has required the Town to balance the Spinney Hill project with comparable housing in a non-racially impacted area (the Cuttermill Road site) outside the NDP area. The net effect will be a dispersion of low and moderate income housing on an integrated basis throughout the Town. Petitioners cannot point to one relevant factor that HUD did not consider before approving the Spinney Hill site and we must reiterate that the rhetoric of petitioner's complaint and affidavits is not evidence and is no basis for setting aside HUD's informed decision to fund the Spinney Hill site. Simply put, there is no evidence to support petitioners' allegations. HUD did not act arbitrarily or capriciously.

Finally, petitioners' allegation that they appear to raise on appeal for the first time, that the Spinney Hill site is not blighted and thus the site does not qualify as an NDP area, is without merit. Petitioners' bare allegation is unsupported by any evidence whatsoever. Indeed, the administrative record is replete with evidence supporting the HUD conclusion that the area is in fact blighted (A. 10-11, 19).

#### (4)

#### **Petitioners have been afforded due process**

Petitioners' claim that they have not been afforded due process of law is unwarranted. In its investigation of their complaint HUD not only waived the 90 day filing requirement but met with petitioners, allowed them to submit data and thoroughly reviewed the site in question for possible civil rights violations. HUD is not required to hold a full plenary public hearing on petitioners' complaint. The findings required to be made by HUD do not

hinge on testimony of those who may be motivated by malice, the credibility or demeanor of witnesses, or persons who have a personal interest in the outcome. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). On the contrary, most if not all the facts are found in public records, visible to all and, by and large, not in dispute. Thus, there was no basis for an evidentiary hearing. It is really the conclusions, not the facts, that are in dispute. Given HUD's expertise and ability to investigate petitioners' complaint, "the complaint is best resolved by independent agency investigation." *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165, 1169 (2d Cir. 1973), quoting from *Geneva Towers Tenants Organization v. Federated Mortgage Investors* (N.D. Cal. 1972), *aff'd*, Nos. 72-2338, 72-2270, 72-2314 (9th Cir., filed Oct. 2, 1974). In sum, petitioners have been afforded due process of law.

### CONCLUSION.

**The order of the District Court should be affirmed.**

Respectfully submitted,

Dated: December 16, 1974

DAVID G. TRAGER,  
United States Attorney,  
Eastern District of New York.

PAUL B. BERGMAN,  
HAROLD J. FRIEDMAN,  
Assistant United States Attorneys,  
Of Counsel.\*

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\*The United States Attorney's office wishes to acknowledge the assistance of Stephen E. Messenger in the preparation of this brief. Mr. Messenger is a third year law student at Brooklyn Law School.



## AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the ~~14~~ 16th day of December 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a ~~Government's Appendix and Brief for the Appellee~~ <sup>Federal Respondents</sup> of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Ralph A. Nappi, Esq.	Robert Rivers, Esq.	Richard J. Osterndorf, Esq.
33 Main Street	287 Post Avenue	Town Hall 220 Plandome Road Manhasset, NY 11030
Port Washington, NY 11050	Westbury, NY 11590	

Sworn to before me this  
16th day of December 1974

*[Signature]*  
Notary Public, State of New York  
Qualified in Kings County  
Certificate Filed in New York County  
Commission Expires March 30, 1978

*[Signature: Deborah J. Amundsen]*

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,  
\_\_\_\_\_, 19\_\_\_\_

United States Attorney,  
Attorney for \_\_\_\_\_

To: \_\_\_\_\_

Attorney for \_\_\_\_\_

SIR:

PLEASE TAKE NOTICE that the within is a true copy of \_\_\_\_\_ duly entered herein on the \_\_\_\_\_ day of \_\_\_\_\_, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,  
Dated: Brooklyn, New York,

\_\_\_\_\_, 19\_\_\_\_

United States Attorney,  
Attorney for \_\_\_\_\_

To: \_\_\_\_\_

Attorney for \_\_\_\_\_

----- Action No.-----

**UNITED STATES DISTRICT COURT**  
**Eastern District of New York**

—Against—

United States Attorney,  
Attorney for \_\_\_\_\_  
Office and P. O. Address,  
U. S. Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

Due service of a copy of the within \_\_\_\_\_  
\_\_\_\_\_ is hereby admitted.

Dated: \_\_\_\_\_, 19\_\_\_\_

Attorney for \_\_\_\_\_